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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-576

J. Gordon Edwards, Ph.D., Thomas H. Jukes, Ph.D.,
Robert White-Stevens, Ph.D.,

Petitioners,

v.

National Audubon Society, Inc.,
Robert S. Arbib, Jr., Elvis J. Stahr, Jr.,

Defendants,

and

The New York Times Company, Roland C. Clement,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS A. ROTHWELL
ARTHUR H. BERNDTSON
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

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TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. The Decision of the Court of Appeals is an unwarranted departure from the decision of the Supreme Court in *New York Times v. Sullivan* and subsequent decisions with respect to matters involving First Amendment-Public Figure-reckless disregard issues . 10

II. The decision of the Court of Appeals raises important questions concerning the rights of public figures under the First Amendment to engage in robust and open debate on controversial issues without fear of destructive reprisals from individuals, whose views are endorsed by the media 15

III. The Court of Appeals, by engaging in a selective review and reevaluation of the evidence adduced at trial, has exceeded the proper scope of its appellate jurisdiction by disregarding and downgrading critical elements of proof of record supportive of the jury verdict and of the post-trial ruling of the trial court, and by fashioning, *arguendo*,

Page

elements of proof not present in the record of this proceeding 19

CONCLUSION 25

APPENDIX A–Opinion of the Court of Appeals 1A

APPENDIX B–Opinion of Judge Metzner Denying Motion of Roland Clement for Judgment Notwithstanding the Verdict 20A

APPENDIX C–Opinion of Judge Metzner Denying Motion of New York Times for Judgment Notwithstanding the Verdict 23A

APPENDIX D–Opinion of Judge Metzner Denying Defendants' Motions for Summary Judgment . . 30A

TABLE OF AUTHORITIES

Page

Cases

Beckley Newspapers v. Hanks, 389 U.S. 81 (1967) . . . 19

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, ____ U.S. ____, 50 L.Ed.2d 777 (1977) . 16

Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) 20

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) . 10, 15

Garrison v. Louisiana, 379 U.S. 64 (1964) 10, 16

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) . 11, 15

Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 19

Guam Federation of Teachers Local 1581 (AFT) v. Ysrael, 492 F.2d 438 (9th Cir.), cert. denied, 419 U.S. 872 (1974) 19

Holden v. Pioneer Broadcasting Co., 365 P.2d 845, cert. denied, 370 U.S. 157 (1962) 16

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15, 16

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) . 2, 10, 11, 14, 16, 18, 19

Nichols v. Item Publishers, 309 N.Y. 596, 132 N.E.2d 860 (1956) 24

Oliver v. Village Voice, Inc., 417 F.Supp. 235 (S.D.N.Y. 1976) 13

Rosenblatt v. Baer, 383 U.S. 75 (1966) 15

St. Amant v. Thompson, 390 U.S. 727 (1968) . . . 10, 13, 19

Time, Inc. v. Hill, 385 U.S. 374 (1967) 20

Time, Inc. v. Pape, 401 U.S. 279 (1971) 10, 11, 13, 19

Statutes

28 U.S.C. § 1254(1) (1970) 2

28 U.S.C. § 1292(b) (1970) 6

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To the Justices of the Supreme Court of the United States:

Petitioners, Dr. J. Gordon Edwards, Dr. Thomas H. Jukes and Dr. Robert H. White-Stevens, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the decision of the United States District Court for the Southern District of

New York, granting a judgment in favor of plaintiffs after a jury verdict awarding Dr. Edwards $21,000 against the New York Times and Roland C. Clement for the Times article and $1.00 against Mr. Clement for the August 14, 1972 letter, and awarding Dr. Jukes and Dr. White-Stevens $20,000 each against the Times and Roland Clement for the Times article and $1.00 each as against Mr. Clement for the August 14, 1972 letter, the total thereof being $61,003.00.

OPINIONS BELOW

1. The opinion of the Court of Appeals is reported at 556 F.2d 113 (2d Cir. 1977).

2. The opinion of the District Court denying the motions of both the New York Times Company and Roland C. Clement for judgments notwithstanding the verdict is unreported, and is reproduced in Appendices B and C of this Petition.

3. The opinion of the District Court denying defendant-appellants' motions for summary judgment is reported at 411 F.Supp. 744 (S.D.N.Y. 1976) and is reproduced in Appendix D of this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 25, 1977. A petition for rehearing with a suggestion for rehearing en banc was filed on June 8, 1977, and denied on July 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, despite the holdings of this Court in *New York Times v. Sullivan* and subsequent decisions, public figure plaintiffs must prove in order to show actual malice, as ruled by the Second Circuit Court of Appeals, that a libelous article was published with actual knowledge of the falsity thereof?

a. Whether the ruling of the Court of Appeals, requiring such showing of knowing falsity, erroneously severed the second branch of the *Sullivan* test, to wit: "reckless disregard of whether it was false or not?" (376 U.S. at 280.)

2. Whether plaintiffs' rights under the First Amendment to engage in robust and open debate on controversial issues have been unlawfully inhibited and violated by the decision of the Court of Appeals which, in effect, affords an unprecedented and near absolute immunity to the press?

3. Whether, by engaging in a selective review and reevaluation of the evidence adduced at trial, the Court of Appeals has exceeded the proper scope of its appellate jurisdiction in disregard of the judgment of the jury as to issues of contested fact, which judgment was confirmed by the trial court?

4. Whether, assuming that the Court of Appeals, in spite of the considered view of the United States District Court for the Southern District of New York, was justified in finding inconsistencies in the jury verdicts as against both Roland Clement and the New York Times, it is a *non sequitur* to dismiss both verdicts?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, which reads in relevant part:

> Congress shall make no law... abridging the freedom of speech, or of the press; ...

as made applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioners Drs. Edwards, Jukes and White-Stevens are, and for many years have been, respected members of the scientific community, engaged in the fields of research and education.

For some years these plaintiffs have published articles in various scientific journals criticizing and opposing the scientific validity of the recent ban-DDT campaign. These publications cite evidence of the potentially destructive effects of the proposed ban on both human and avian populations.

National Audubon Society (Audubon), one of the DDT ban's most prominent sponsors, has for decades conducted an annual Christmas Bird Count and, in recent years, has published a statistical analysis in its magazine "American Birds". From the Bird Count statistics, plaintiffs and others have observed a correlation between the increased manufacturing and use of pesticides, including DDT, and increasing bird populations.

In its Foreword to the April 1972 edition of "American Birds" (which was not distributed until July 1972), Robert S. Arbib, editor of this magazine, wrote:

> We are well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.
>
> This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons.
>
> * * *
>
> With increased local coverage by the press of Christmas Bird Count activities, it is important tha[n] Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders.* Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about (668e).

During the month of July, 1972, John Devlin, a long-time nature reporter for the New York Times (Times), read this article in American Birds and determined to create a newsworthy and dramatic story by urging Mr. Arbib to supply him with the names of the people alluded to in the Foreword. After two unsuccessful attempts to obtain this information, five names were made available to Devlin by Arbib, who had been furnished a manuscript by Roland C. Clement, Vice President of Audubon, which contained the five names. According to Arbib, Devlin was cautioned that none of the people noted in the Foreword were being called liars by Audubon.

Subsequent to receiving the names from Arbib, Devlin telephoned plaintiffs and Dr. Donald Spencer, who is one of the scientists not a party to this litigation. The substance of these calls was that all the parties concerned flatly denied the truth of the Audubon accusations, and Dr. Spencer characterized the Foreword language as "almost libelous." Ironically, this characterization appeared in the Devlin article.

Despite plaintiffs' indignant reactions to these attacks on their characters, Arbib's disavowal of any defamatory intent, and literature sent by two of the plaintiffs herein to Devlin in support of their views with respect to DDT and the Audubon Bird Count data, Devlin wrote three summaries of his news story, which story appeared as an article on August 14, 1972 in the New York Times, headlined "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." The Times article quoted extensively from the Audubon Foreword, reiterated the "paid to lie" charge, and made brief reference to plaintiffs' reactions thereto.

On the day of the Times publication, Clement drafted a letter to the Times and mailed it over Arbib's signature, after having conferred with Arbib by telephone about its contents. The letter referred to "Jack Devlin's punchy piece" and concluded with the statement: "Nor do we like to call people liars, but. . . ." The next day Clement circulated an internal office memorandum entitled "The Question of Liars" which admitted that "Arbib was probably incautious in giving Devlin the names involved, something he got from me. Devlin probably

asked whom do you consider liars. . . ."

Plaintiffs commenced a diversity action for defamation against Audubon, three Audubon employees and the Times on April 18, 1973 in the United States District Court, Southern District of New York. In December 1975 the District Court denied defendants' separate motions for summary judgment and for certification of the Order denying defendants' motions for summary judgment to permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970).

On June 3, 1976, the matter came on for trial before Judge Metzner and a jury. Prior to the impanelling of the jury, the Court ruled that the publications in question (the Times article and the Clement letter) were libelous *per se* (Tr. 4).

At the trial, Devlin stated that when he asked Arbib for the names of the persons to whom the Foreword referred, Arbib "was reluctant to give the names," and did not do so at that time. When Arbib finally gave the names to Devlin, Devlin recognized one of the named "liars" as a Nobel Laureate. Devlin attempted to contact all five named scientists by telephone. The three who were reached denounced the Foreword, in Devlin's words, as "unfounded, emotional and hysterical" and "almost libelous."

At this point, Devlin did not treat the story as "hot news" and write a story for immediate publication. Devlin wrote three summary versions of his story, taking several days, admittedly a "most unusual" procedure (Tr. 96). The Times article appeared in the April 14, 1972 issue of the newspaper, under the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." Devlin denied having written the headline and, after inquiring as to its authorship, the Times was unable to determine who wrote the headline.

Plaintiffs testified as to their respective professional and educational backgrounds and the events culminating in this lawsuit. Dr. White-Stevens, a professor of biology at Rutgers University, stated that he received a telephone call from Devlin on August 4, 1972, wherein Devlin first brought the accusations in the Foreword to his attention. White-Stevens told Devlin that

the charges contained in the Foreword against him and his associates were not true, and that he was not employed by the pesticide industry.

During the extended phone conversation, White-Stevens explained to Devlin in detail that the Audubon Christmas Bird Count reflected an increase in the bird population based on a bird/per observer calculation based upon Audubon's own published statistics. These rather simple statistical tabulations were in Devlin's possession before he wrote the August 14 article.

Troubled by Devlin's stated intention to publish this story in the New York Times, Dr. White-Stevens sent a letter to Devlin on August 8 which listed the names of other scientists who would confirm Dr. White-Stevens' position on the matter and included the statistical tabulations noted above.

Dr. Edwards, a professor of entomology at San Jose State University testified that according to his field and research studies over a twenty-year period, the advent and use of insecticides had caused no reduction in bird populations. He stated that he had never been in the employ of any chemical company.

The last plaintiff to testify was Dr. Jukes, a professor of medical physics at the University of California at Berkeley. Also contacted by Devlin after the publication of the Audubon Foreword, Dr. Jukes reiterated his colleagues' position that on a "per observer" basis, the number of birds had increased over a ten-year period, despite exposure to insecticides. Thus, prior to the preparation of any article by the Times, Devlin's conversations with plaintiffs showed that the Audubon charges were squarely contravened by plaintiffs' denials and by supporting literature, including Audubon's own data.

Plaintiffs also called Maurice Freedman, the coordinator of Technical Services at the New York Public Library, as an expert witness in library science to testify that the daily domestic circulation of the August 14, 1972 edition of the New York Times was nearly one million copies. Additionally, he stated that most libraries carry the Times on microfilm for subsequent

research use by scholars and academicians. Philip Marvin, a crop protection consultant and author of various treatises dealing with the Audubon Christmas Bird Counts, testified on behalf of plaintiffs that the accusations in the Audubon Foreword were untrue. Two of his publications which focused specifically on bird population increases over a 20-year period on a "per observer" basis were sent to Devlin by plaintiffs before the Times article was printed. Notably, Marvin stated that he had participated in the bird counts and was familiar with the observation techniques employed. There was no effort made during the trial by defendants to challenge the truth of plaintiffs' analysis of Audubon's Christmas Bird Counts.

Victor Yannacone, an attorney who was one of the initial founders of the Environmental Defense Fund (EDF), testified on behalf of plaintiffs that since EDF became funded by Audubon, he had personal knowledge of Roland Clement's role as trustee and technical assistant of EDF. He stated that during meetings between Clement, himself and Dr. Charles Wurster, a research scientist for EDF, plaintiffs' names were discussed in connection with EDF's efforts to advance its anti-pesticide policy. Clement was present when the subject of silencing Dr. Jukes was proposed by destroying his scientific credibility. The tactic discussed by Yannacone, as reviewed by Clement, among others, was to induce scientists to testify during environmental litigation and to attempt to get them to commit themselves to untenable positions. The tactic was to then launch a "smear" campaign by providing the press with transcripts of their cross-examination, highlighting the inconsistencies thereof.

Arbib, the author of the Foreword, testified for Audubon that he told Devlin during their initial conversation that the Foreword was a "generalized warning" and that he had no specific names in mind when Audubon published the Foreword. The subsequent source of the names was a manuscript by Clement which Clement furnished Arbib. During the third phone call from Devlin, Arbib finally gave Devlin the names with a disclaimer that "I made it very clear to him that under no circumstances was he to say that we were calling Mr. Jukes a paid liar or Dr. White-Stevens a paid liar or anything like that."

Devlin was told that plaintiffs' names were to be used only in connection with Audubon's charge that certain scientists had misinterpreted the bird count information. Arbib also stated that he disagreed with the substance of Clement's August 14th letter to the Times, especially to the use of such phrases as "Devlin's punchy piece." Despite Arbib's objections expressed to Clement that the letter misrepresented Arbib's views about the Times article, the letter was sent over Arbib's signature by Clement.

Clement testified that in his "overview function of the scientific validity of Audubon Society positions," he reviewed the draft of the Foreword and suggested adding the words "or parroting something they know little about," following the "paid to lie" accusation. However, he did nothing further to soften the tone of the Foreword, and did not suggest that the "paid to lie" phrase be stricken. Clement testified that Dr. Spencer was dishonest and that plaintiffs were incompetent. However, when specifically asked on what basis he objected to plaintiffs' use of the Audubon bird count data, Clement was unable to identify any instance of misuse or misinterpretation.

Audubon next called Dr. Wurster to rebut Yannacone's testimony and then rested. Times called no witnesses. Before instructing the jury, Judge Metzner dismissed the action against Audubon with respect to the American Birds Foreword, because it made no reference by name to plaintiffs. The case was then submitted to the jury under instructions that the Times article and Clement letter were libelous *per se*. The jury returned a verdict against the Times and Clement for $61,000, and an additional verdict for $3.00 as against Clement.

After the verdict was rendered, defendants filed motions for judgment notwithstanding the verdict, which the Court denied. The Court held that, upon a review of the evidence, the jury was fully justified in finding that the Times and Clement were liable for transforming, with reckless disregard for the truth, a nonactionable publication in American Birds into one that was clearly libelous as appeared in the August 14, 1972 edition of the New York Times.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS AN UNWARRANTED DEPARTURE FROM THE DECISION OF THIS COURT IN *NEW YORK TIMES v. SULLIVAN* AND SUBSEQUENT DECISIONS WITH RESPECT TO MATTERS INVOLVING FIRST AMENDMENT-PUBLIC FIGURE-RECKLESS DISREGARD ISSUES

New York Times v. Sullivan, 376 U.S. 254 (1964), gave recognition to the proposition that in order for a public official to prevail in a libel action for defamatory statements made by the news media with respect to his official conduct, he must prove clearly and convincingly that the publication was made with actual malice—with knowledge that the statement was false or with reckless disregard of whether it was false or not. *Id.* at 279-280. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the opinion of the Court emphasized the necessity for a showing that a false publication had been made with a "high degree of awareness of probable falsity." *Id.* at 74. This same burden of proof was applied to public figure plaintiffs in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). One year later this Court further defined actual malice by saying:

> Reckless conduct is not measured by whether the reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), this Court reviewed a judgment against Time magazine in light of these earlier holdings and held that Time's failure to state that the United States Commission on Civil Rights had based its report merely

on the allegations contained in a private complaint was insufficient to sustain a jury finding of actual malice. However, the Court of Appeals in the case at bar has extended *Pape* by creating a new level of privilege in the reporting of charges against a public figure "regardless of the reporter's views regarding their validity" (Slip Opinion at 3769).

Taken together, these cases affirm the principle that the First Amendment guaranty of freedom of the press demands that some constitutional protection be afforded the news media against defamation suits by public officials and public figures if the people are to remain informed on issues of national significance. Thus, in the words of Justice Brennan:

> Debate on public issues should be uninhibited, robust and wide-open; thus, some erroneous statements must be protected as inevitably arising from the exercise of First Amendment rights. A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions leads to self-censorship. *New York Times v. Sullivan, supra* at 270, 279.

Simply stated, it now seems well-settled that, except for plaintiffs who are not public figures, a verdict based on mere negligence is constitutionally impermissible in defamation litigation. *Gertz v. Welch*, 418 U.S. 323 (1974).

In reversing the judgment of the District Court in the case at bar, the United States Court of Appeals for the Second Circuit has made an unwarranted and unprecedented departure from these governing principles by effectively reading out of existence the second branch of the *New York Times v. Sullivan* rule—reckless disregard.

An impartial review of the abundant evidence upon which the jury finding of actual malice against the Times and Roland Clement was based should have been sufficient for the Court of Appeals to sustain the jury verdict. It is noted that Judge Metzner's denial of both defendants' motions for judgment notwithstanding the verdict fully explained the determination of the jury with respect to the evidence adduced at trial.

Devlin's journalistic background leaves no doubt that as a nature reporter of several years he was aware that Audubon published annual Christmas Bird Count data which was used by ornithologists and scientists alike to support antagonistic positions on the effects of the proposed ban on the use of DDT. In light of his knowledge of the acerbic nature of the controversy, Devlin, more than other news reporters, must have known from the beginning that his proposed article was potentially libelous. Indeed, the Court of Appeals concedes as much:

> The appellees were charged with being 'paid to lie.' It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than 'paid liar.' It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees. (Slip Opinion at 3773).

Granting that the Times has published a libelous article, it becomes essential to examine Devlin's motives and overt behavior in proceeding intemperately to publication in the face of abundant warnings, strongly suggesting a more prudent course of action. It is uncontroverted that Arbib refused Devlin's initial requests to provide him with the names of those referred to in the Audubon Foreword. Only at Devlin's persistent urging did Arbib reluctantly respond to Devlin's repeated inquiries. There was conflicting testimony as to whether Arbib cautioned Devlin about not using plaintiffs' names in the context of the "paid liar" accusation. Devlin shifted from certainty that no such caveat ever issued, to confusion when confronted with his deposition testimony which revealed that he recalled that Arbib had said he thought it might be better not to use the names. Arbib's recall of the telephone exchanges between him and Devlin stands in sharp relief to Devlin's faded memory.

Despite the evidence that Devlin had been amply forewarned by Arbib, by the plaintiffs themselves, and by the literature sent to him on the subject of insecticides and bird

populations, the Court of Appeals held that since Devlin ". . . in good faith elicited both sides of the story to the best of his ability. . . the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity (because) . . . we do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth." (Slip Opinion at 3764, 3769, 3770).

This legal conclusion is unjustifiable both in fact and in law. Much less egregious conduct on the part of the defendant-publisher in *St. Amant v. Thompson, supra,* prompted the Court to say:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements made were true. The finder of fact must determine whether the publication was made in good faith. Professions of good faith . . . will [not] be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *See also, Oliver v. Village Voice, Inc.,* 417 F.Supp. 235 (S.D.N.Y. 1976).

Thus, when the Court of Appeals finds that Devlin's motives in republishing the original accusations were to avoid unnecessary injury to eminent persons by Audubon's attack (Slip Opinion at 3763), it is pertinent to question why, if this was his concern, he published the article despite his knowledge that plaintiffs were not associated with the pesticide industry.

Similarly, the Court in *Time, Inc. v. Pape, supra* at 286, demonstrated its awareness of the precise problem at hand—the reworking of a statement neutral on its fact into a defamatory attack:

> Where the source [of the news] has engaged in

> qualifying the information released, complexities ramify. Any departure from full, direct quotation of the words of the source, with all its qualifying language, confronts the publisher with a set of choices.

For the Court of Appeals to find, on the one hand, that Arbib "never intended to portray anyone in particular as a venal prevaricator" (Slip Opinion at 3762), and then proceed to the conclusion that the "Times article. . .was the exemplar of fair and dispassionate reporting" (Slip Opinion at 3770), is manifestly inconsistent with the evidence from which the jury might have found that Devlin was dubious of the accuracy of Audubon's allegations, and that he entertained serious doubts concerning whether plaintiffs were paid liars.

The Court of Appeals also refused to follow the "reckless disregard" branch of the *New York Times v. Sullivan* actual malice definition by exculpating Clement from liability:

> There is scarcely a wisp of evidence in the record from which it could be inferred that... Clement supplied Arbib with appellees' names, *knowing* they would be portrayed as 'paid liars'. (Slip Opinion at 3773).

No reported case has yet held that the *only* method of proving actual malice is by showing that a publication was made with knowledge that the statement was false. Indeed, the wisdom of defining actual malice in terms of reckless disregard as well as knowing falsity lies in the fact that in defamation cases liability must often be predicated on the gross abandon with which one treats the truth.

Until this time, it would have been sufficient to prove that Clement supplied Arbib with plaintiffs' names with reckless disregard as to whether they would be portrayed as paid liars. At present, the state of the law appears unclear, and, if allowed to remain undisturbed, the opinion of the Court of Appeals will serve as precedent for a principle never contemplated by this Court.

II.

THE DECISION OF THE COURT OF APPEALS RAISES IMPORTANT QUESTIONS CONCERNING THE RIGHTS OF PUBLIC FIGURES UNDER THE FIRST AMENDMENT TO ENGAGE IN ROBUST AND OPEN DEBATE ON CONTROVERSIAL ISSUES WITHOUT FEAR OF DESTRUCTIVE REPRISALS FROM INDIVIDUALS, WHOSE VIEWS ARE ENDORSED BY THE MEDIA

The individual's right to protection of his own good name is entitled to recognition as a basic of our constitutional system. *Gertz v. Welch,* 418 U.S. 323, 341 (1974), citing with approval *Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966). Moreover, the guarantees of freedom of speech and press belong to individuals in their own right to make their thoughts public and put them before the community. Likewise, they are a social necessity required for the maintenance of our political system and an open society. *Curtis Publishing Co., v. Butts* 388 U.S. 130, 149 (1967). In *Butts,* this Court expressed its views favoring a public policy imposing acceptable limitations which "neither affect the impartial distribution of news or ideas . . . nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish." *Id.* at 150-151.

In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), the constitutionality of a state "right to reply" statute was challenged under the First Amendment. Weighing carefully the view urged by appellees that "the First Amendment interest of the public in being informed [was] in peril because the 'marketplace of ideas' [was becoming] a monopoly controlled by the owners of the market," the Court held that any *governmental* compulsion to publish was violative of the First Amendment because it operated as an interference with the exercise of editorial control and judgment. *Id.* at 258.

By design, the rule of *Miami Herald* is limited to a set of facts which involves state encroachment upon the freedom of the press by exacting a criminal penalty for failing to provide

equal space for political candidates to reply to criticisms and attacks on their records. To argue in the case at bar that no infringement of the First Amendment rights of plaintiffs could ever occur in light of *New York Times v. Sullivan,* as did the Times in its reply brief to the Court of Appeals, is to suggest a far broader application of the *Miami Herald* holding than has been as yet contemplated. In this same regard, retraction statutes have been struck on the ground that they violate the Due Process Clause of the Fourteenth Amendment since they mandate that recovery of damages in libel cases is contingent upon proof that a demand for retraction was made and refused. *Holden v. Pioneer Broadcasting Co.*, 365 P.2d 845, *cert. denied,* 370 U.S. 157 (1962). Indeed, Justice White in his concurring opinion in *Miami Herald* wrote:

> The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen. *Id.* at 263.

Thus, since it has been stated that "there is no constitutional value. . .in the intentional lie or careless error," *Gertz v. Welch, supra* at 340, and that such false statements made with reckless disregard of the truth enjoy no constitutional protection, *Garrison v. Louisiana, Supra* at 75 (1964), *Buckley v. Littell,* 539 F.2d 882, 882, 893 (2d Cir. 1976), it follows that the First Amendment does afford shelter to the individual who voices his opinion to the public as against unfounded character assassinations by other individuals and the press. Otherwise, the expression of unpopular positions would become an exercise only to be undertaken after attempting to gauge the destructive consequences that would surely flow from those whose resources to influence the public are virtually overpowering.

The decision of the Court of Appeals in this case goes far towards discouraging a climate of open and robust debate which the Court in *New York Times v. Sullivan* asserted as essential to an ordered society. We are in complete agreement that "a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their

ability to intelligently govern themselves." (Slip Opinion at 3758-3759). Implicit in this pronounciation is the fact that the maintenance of informed judgment depends upon the transmission of *all* responsible points of view on issues over which such sharp debate has persisted for so many years.

This societal requirement is particularly imperative when such governmental functions as shaping our environmental policy would be seriously impaired by lack of access to information which would be withheld through fear of exposure to public ignominy. Fundamentally, the question is whether, without equal protection of the First Amendment rights of individuals, we can afford to cloak the press with the awesome responsibility of acting as the ultimate filtration process through which all ideas must pass, allowing it unfettered discretion to decide which points of view are worthy of approval, and which individuals and ideas are to receive the punitive sanctions of adverse personal publicity. If we are to afford the press such latitude as suggested by the Court below, may we rest assured that, after having made such judgment, the press will maintain a neutral and disinterested perspective in its reporting? We suggest that such a question can only be answered in the negative.

Plaintiffs, as responsible advocates of a minority position with respect to an issue of national significance, chose to disseminate information to the public in an effort to provide some enlightenment as to their interpretation of Audubon's published statistical bird count data. Plaintiffs have no quarrel with the flexibility and breathing space permitted by the law with respect to critical evaluation of ideas in the context of a sharply divided controversy. To the contrary, it is precisely this toleration of acceptable levels of disagreement that encourages and stimulates the heightened awareness with which informed decisions can be made.

However, when criticism degenerates into wanton *ad hominem* attack by a major journalistic entity, and an officer of a nationally prominent naturalist organization, without providing legal redress for demonstrable permanent injury to the

reputation of plaintiffs, the end result may well be to stifle the creative exchange of ideas which the First Amendment seeks to protect as sacrosanct.

Plaintiffs do not propose, as the Court of Appeals suggests, that "the press [must] take up cudgels against dubious charges in order to publish without fear of liability for defamation." (Slip Opinion at 3770). Indeed, it is elementary that the press cannot act as both ultimate arbiter of truth and as dispassionate disseminator of information. However, the position taken by the Court of Appeals that "the public interest in being fully informed . . . demands that the press be afforded the freedom to report such charges without assuming responsibility for them" (Slip Opinion at 3770) strongly implies that the press has no obligation whatsoever to investigate the accuracy of the source of its news. Such sweeping immunity from defamation liability would have the ironic effect of operating as a prior restraint upon all of those who would be silenced by the fear of irresponsible and overwhelming countercharge.

Plaintiffs contend that the First Amendment guarantees of freedom of speech and press are by no means mutually exclusive or irreconcilable. *New York Times v. Sullivan* wisely recognized that some friction is inevitable in our society since the democratic process can derive sustenance only from constant exposure to ideological conflict. In support of this fundamental policy judgment, the press has been provided adequate protection from defamation liability by an evidentiary burden imposed upon public figures which permits wide latitude in the exercise of editorial judgment. Nevertheless, no justification exists for licensing the press to launch with impunity indiscriminate attacks on the professional integrity of respected members of the scientific community such as plaintiffs. Consequently, we invite this Court to reaffirm its commitment to the accommodation of the concomitant exercise of these two vital liberties so that no exorbitant price is exacted from either the press or the individual.

III.

THE COURT OF APPEALS, BY ENGAGING IN A SELECTIVE REVIEW AND REEVALUATION OF THE EVIDENCE ADDUCED AT TRIAL, HAS EXCEEDED THE PROPER SCOPE OF ITS APPELLATE JURISDICTION BY DISREGARDING AND DOWNGRADING CRITICAL ELEMENTS OF PROOF OF RECORD SUPPORTIVE OF THE JURY VERDICT AND OF THE POST-TRIAL RULING OF THE TRIAL COURT, AND BY FASHIONING, *ARGUENDO*, ELEMENTS OF PROOF NOT PRESENT IN THE RECORD OF THIS PROCEEDING

In *New York Times v. Sullivan, supra* at 285, the Court stated that its:

> . . . [d]uty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. [T]he rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see. . .whether they are of such a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

This rule of "record examination" to determine whether the evidence in libel cases can constitutionally support a judgment has been followed consistently. *Time, Inc. v. Pape,* 401 U.S. 279 (1971); *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6 (1970); *St. Amant v. Thompson,* 390 U.S. 727 (1968); *Beckley Newspapers v. Hanks,* 389 U.S. 81 (1967); *Guam Federation of Teachers Local 1581 (AFT) v. Ysrael,* 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974).

However, it is equally indisputable that where a result has been reached on the trial court level which finds reasonable support in the record, it is for the jury, not for an appellate court, to determine whether there was knowing or reckless falsehood. *Time, Inc. v. Hill,* 385 U.S. 374, 394 (1967); *Carson v. Allied News Co.,* 529 F.2d 206 (7th Cir. 1976). Any other rule would undermine the principles of *res judicata* and finality of judgments which are essential to an orderly administration of justice. These guidelines were followed by the District Court.

At the close of the discovery phase of this litigation, defendants moved for summary judgment on the ground that plaintiffs had failed to raise a disputed genuine issue as to actual malice. In denying defendants' motions, Judge Metzner reviewed the depositions of the parties and the prospective witnesses and concluded that significant factual disputes existed with respect to the "state of mind and good faith of defendants in publishing a charge that plaintiffs were lying" (95a). Defendants then moved the District Court to grant an immediate interlocutory appeal from its order denying the motions for summary judgment. The Court adhered to its original order, thereby denying the request for certification, and correctly stated that since Arbib had testified in deposition that he warned Devlin against calling plaintiffs paid liars, which Devlin flatly denied, the Court could not usurp the essential jury function of making a factual determination on the issue of actual malice. Consequently, the District Court in the first instance recognized that this case involved a judgment as to the credibility of two witnesses and, as such, plaintiffs were entitled to a determination by the jury.

In reversing the verdict of the jury rendered against the Times and Clement, the Court of Appeals chose to accord great significance to certain crucial elements of evidence and to disregard other such elements in reaching the decision that both defendants lacked the requisite state of mind for defamation liability under the prevailing rules of law.

A. As to the Times.

For the jury to have held the Times liable in this case, it must have disbelieved Devlin's protestations that he sought to

publish plaintiffs' names because "many eminent persons associated with the pesticide industry might be unnecessarily hurt by the Society's indiscriminate attack." (Slip Opinion at 3763). That the Court of Appeals finds as a fact such self-serving testimony flies in the face of reason and the evidence. It is appropriate to ask the following question: if Devlin was concerned about protecting the reputations of persons who might be unjustifiably injured by the Audubon accusations, how were his motives furthered by publishing the names of people who told him that they were likewise unassociated with the pesticide industry?

Similarly, the Court of Appeals' acceptance of Devlin's testimony that Arbib never cautioned him against the use of plaintiffs' names in connection with the "paid liar" epithet is unsupported by the record. At trial, Devlin could not even remember the details or chronology of the telephone conversations with Arbib. His recall as to whether Arbib warned him against using plaintiffs' names in the Times article was so abysmal that the only reliable source of information on this issue was Devlin's deposition testimony, which revealed that the warning had in fact issued from Arbib. In striking contrast, Arbib repeatedly asserted that he had emphatically urged Devlin not to publish plaintiffs' names in conjunction with excerpts from the Foreword because it had been authored with no specific names in mind.

In the same vein, the Court of Appeals stated that "(Devlin) testified that Arbib made it clear that the scientists whose names were furnished to the Times were the persons referred to in Arbib's 'Foreword' to American Birds" (Slip Opinion at 3764). A thorough search of the records fails to disclose the existence of such testimony from Devlin. Moreover, Arbib clearly remembered telling Devlin that the factual basis for the Foreword was hearsay information that somebody was engaging in misinterpretation of the Audubon bird count data.

Further evidence that Devlin was alerted to the baselessness of Audubon's charges was provided by plaintiffs to Devlin in the form of both scholarly and popular literature which

commented specifically on the reliability and interpretation of the bird count data. As to this information, the Court of Appeals found that "none of the material responded directly to Audubon Society's criticism of the use of its bird count data..." (Slip Opinion at 3764). However, Devlin acknowledged receipt of an article written by Philip Marvin which posited that the data showed a steady growth in bird populations despite the increased usage of modern insect and weed control chemicals (680c). Also an article written by Roger Tory Peterson, the 1971 Audubon Medalist, stated that the bird counts, analyzed intelligently, were "excellent indicators of the environment—a sort of ecological litmus paper" (687e). Additionally, well prior to the Times publication, Dr. Jukes supplied Devlin with the table of bird count data and a summary of hawk migration showing a tripling of hawk species sighted at a flyway observatory in Pennsylvania.

While finding little difficulty in discrediting evidence which could have supported the jury finding of actual malice, the Court of Appeals with equal ease apparently overlooked other items of evidence which also permitted the conclusion that the Times published the libelous article with serious doubts as to the truth contained therein. For example, it is uncontroverted that Devlin did not treat this story as fast-breaking news which required immediate publication. Instead, several days elapsed between Devlin's reading of the Foreword and the appearance of the Times article, during which time Devlin prepared three summaries of the story. Of significance is Devlin's manifest ambivalence with respect to the use of the word "liar" as evidenced by the fact that, of the three summaries, one of them does not contain this word. At trial, Devlin could offer no explanation for his omissions and/or insertions as the story evolved into print.

The Court of Appeals had no quarrel with the ruling of the District Court that the Times article was libel *per se*:

> ... [T]o call the appellees, all of whom were university professors, *paid liars* clearly involves defamation that far exceeds the bound of the prior

> controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid to lie* implies corruption, and not merely a poor opinion of his scientific integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case. (Slip Opinion at 3772, n. 5).

However, despite Arbib's warnings, plaintiffs' denials of the charges, their supporting literature and Devlin's own hesitation in labelling plaintiffs as liars, the Court of Appeals found:

> ... that Devlin was unaware of the baselessness of the Audubon Society's dramatic allegations. Nor was there a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were 'paid liars' (Slip Opinion at 3771).

B. As to Clement.

The characterization and evaluation of the evidence by the Court of Appeals with respect to Clement's role in this case is likewise circumspect. Clement's active participation in the preparation of the Foreword, his prior commitment to silencing plaintiffs through EDF litigation, the August 14, 1972 letter to the Times and his willingness to cast opprobrium on plaintiffs, even at trial, all reflect a state of mind bent on vilification. Yet the Court of Appeals portrays Clement as "astonished" by the Times article, and finds that his motivation for the letter was to "play down" the Audubon accusation, all without having observed Clement's contempt for and hostility towards plaintiffs throughout the proceedings.

Likewise, the Court's appraisal of Clement's letter to the Times as having "eschewed all the suggestions of venality that had appeared in the American Birds Foreword and Times article" (Slip Opinion at 3768) was made without consideration of the totality of the evidence offered to prove his liability and in disregard of the plain meaning of common vocabulary. It is

self-evident that had Clement wanted to convey unequivocally his lack of defamatory intent, he would have said so in his letter. Rather, it opens with a phrase qualifying, not repudiating, the offensive language in the Foreword.

Plaintiffs also find disconcerting the implication that Clement's omission of the word "paid" before "liar" in his letter to the Times avoids any injurious connotation as to plaintiffs' reputations. It does violence to the English language to suggest that the use of the word liar, standing by itself, is an expression of opinion rather than an accusation, and, as such, cannot be libelous. Furthermore, the law of New York recognizes no such distinction. *Nichols v. Item Publishing Co.*, 309 N.Y. 596, 132 N.E. 2d 860 (1956).

Most disturbing is the finding that "there is scarcely a wisp of evidence in the record from which it could be inferred that . . . Clement supplied Arbib with appellees' names *knowing* they would be portrayed as paid liars." (Slip Opinion at 3773). Unlike Arbib, Clement was undeterred by Devlin's insistence and when asked by Arbib for plaintiffs' names, he simply passed one of his own articles on to Arbib without a word of caution.

It takes little imagination to realize that the Times' sole interest in a story of this nature was in linking specific names to the dramatic accusation that certain scientists were being paid to lie. Since Clement provided Arbib with plaintiffs' names in the first instance, he was the operative force behind the Times article, and his assistance was the *sine qua non* of that libelous publication.

The most persuasive evidence of Clement's intent to portray plaintiffs as paid liars was the testimony of Victor Yannacone, Jr., who placed Clement at EDF board conferences participating in discussions to destroy the scientific credibility of EDF opponents, including Drs. Jukes and White-Stevens. However, in relegating this evidence to a footnote in its opinion and implicitly deprecating Yannacone's credibility as a witness, the Court of Appeals has again undermined the fact-finding function of the jury.

We ask that this Court recognize that in this case the outer limits of appellate review of jury verdicts have been exceeded and, more importantly, to prohibit appellate courts from overturning verdicts in libel cases when ample evidence therefor exists in the record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS A. ROTHWELL
ARTHUR H. BERNDTSON

Attorneys for Petitioners

APPENDICES

Appeal from a judgment of the United States District Court for the Southern District of New York, Charles M. Metzger, *J.*, entered after a jury trial, awarding aggregate damages of $61,003 for defamation to the appellees, and from prior orders denying summary judgment, denying a directed verdict, and denying judgment notwithstanding the verdict.

Reversed. Judgment for defendants-appellants dismissing the complaint.

FLOYD ABRAMS, New York, N.Y. (Eugene R. Scheiman, Ruth D. MacNaughton, and Cahill Gordon & Reindel, New York, N.Y., of counsel), *for Defendant-Appellant New York Times Company.*

MORRIS ZWEIBEL, Mineola, N.Y. (Gifford, Woody, Carter & Hays, New York, N.Y., and Crowe, McCoy, Agoglia, Fogarty & Zweibel, P.C., Mineola, N.Y., of counsel), *for Defendant-Appellant Roland C. Clement.*

THOMAS A. ROTHWELL, Washington, D.C. (Arthur H. Berndtson, and Rothwell, Capello & Berndtson, Washington, D.C., of counsel), *for Plaintiffs-Appellees.*

KAUFMAN, *Chief Judge:*

In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet. It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently

govern themselves. As we said in *James* v. *Board of Education,* 461 F.2d 566, 572, "To preserve the 'marketplace of ideas' so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement." In the thirteen years since *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), the federal courts have steadfastly sought to afford broad protection to expression by the media, without unduly sacrificing the individual's right to be free of unjust damage to his reputation. *See, e.g., Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971); *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971); *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). This important case requires us to return again to this task.

We are invited today to affirm a libel judgment against the *New York Times* for accurately reporting dramatic statements of the National Audubon Society attacking the good faith of prominent scientists supporting continued use of the insecticide DDT. There can be little doubt that the *Times* reasonably considered these accusations of a leading environmentalist organization to be newsworthy. We are further requested to affirm judgments against Roland Clement, a Vice-President of the Society, despite the absence of any evidence in the record that he endorsed or made the single statement that could be found to have been libelous under the Constitution. We are convinced that the First Amendment requires us to decline these invitations. Accordingly, we will reverse and order the complaint dismissed.

I.

A brief summary of the facts is indispensable to understanding the difficult legal issues presented by this appeal.

The DDT debate. The publication fifteen years ago of

Rachel Carson's *Silent Spring* set off a furious controversy that, even today, continues to rage around the insecticide DDT. Naturalists and environmentalist groups like the National Audubon Society have vigorously opposed DDT because, in their view, use of the chemical endangers bird life. Proponents of the pesticide deny this charge and forcefully urge that, without DDT, millions of human beings will die of insect-carried diseases and starvation caused by the destruction of crops by insect pests.

As might be expected when such fundamental questions of value enter the debate, at times the DDT controversy has exceeded the limits of temperance and good manners. Naturalists have insinuated that many proponents of DDT are unduly influenced by the selfish interests of the pesticide industry. On the other hand, such an outstanding advocate of DDT as appellee Dr. J. Gordon Edwards, has characterized a ban on export of the insecticide, supported by the Audubon Society, as "deliberately genocidal." [1] Accusations of scientific bad faith have unfortunately become almost commonplace on both sides.

Arbib's "Foreword" to American Birds. The scientists who advocate continued use of DDT respond to charges that the chemical destroys bird life by citing the annual Audubon Society Christmas Bird Count, which shows a steady increase in bird sightings despite the growing employment of pesticides in the last thirty years. The Audubon Society believes this is an invalid use of its statistics, because there are many more bird counters now and because bird watchers have grown more skilful in recent years with better access to observation areas. This dispute over the interpretation of the Society's statistics lies at the heart of the controversy over DDT's threat to bird life.

1 Edwards, Address to the 71st National Meeting of the American Institute of Chemical Engineers (February 23, 1972).

By 1972 the DDT controversy was raging at peak intensity,[2] and the Audubon Society was acutely alarmed at what it considered the persistent misuse of its Bird Count data. Accordingly, Robert S. Arbib, Jr., a highly respected amateur ornithologist and editor of the Society's publication *American Birds,* determined to preface his report of the 1971 Christmas Count with a warning against distortion of the results. His foreword to the April, 1972, issue of *American Birds,* contained the following comment on the Count's significance:

> We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.
>
> This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, es-

2 In March, 1972, seven months of administrative hearings on the deleterious effects of DDT use were concluded, and the Administrator of the Environmental Protection Agency, William D. Ruckelshaus, was personally struggling with the question whether to ban DDT. On June 14, 1972, Ruckelshaus revoked the registration of DDT for most purposes and ordered that use of the pesticide should be discontinued by December 31 of that year. This order was eventually affirmed by the United States Court of Appeals for the District of Columbia Circuit. *See Environmental Defense Fund* v. *E.P.A.*, 489 F.2d 1247 (D.C. Cir. 1973).

pecially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders.* Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

Despite the potentially explosive character of the allegation that scientists supporting DDT were paid liars, Arbib does not appear to have had any factual basis for the charge. Indeed, he testified that his comment was never intended to portray anyone in particular as a venal prevaricator; rather, it merely expressed his belief that many supporters of DDT use were spokesmen for the pesticide industry.

The New York Times Article. Arbib's general accusations came to the attention of *New York Times* nature reporter John Devlin in late July, 1972. Devlin immediately realized that the Audubon Society's charges were a newsworthy development in the already acrimonious DDT debate, and he accordingly telephoned Arbib to obtain the names of those the Society considered "paid liars".

Arbib was initially reluctant to identify any individuals as the people referred to in his article. But, as a result of Devlin's persistent urging that many eminent persons associated with the pesticide industry might be hurt unnecessarily by the Society's indiscriminate attack, Arbib eventually promised to furnish the names of specific individuals whom he felt were justly subject to the Society's charges.

Arbib, of course, did not know of anyone in particular whom he could with assurance call a "paid liar". He turned, therefore, to Roland Clement, the Audubon Society's Staff Biologist and Vice-President, who more than any other official of the naturalist organization had embroiled himself in the DDT controversy and had knowledge of its participants. Arbib testified that Clement strongly emphasized he could not call anyone specifically a paid liar. He could, however, identify those who had most persistently misused Bird Count data, despite the Society's efforts to point out their error. Clement told Arbib he had just completed an article for an environmentalist journal which listed the scientists whose distortion of the Audubon statistics seemed most egregious,[3] and, in Arbib's words,

> he believed it would be all right to give the names to Mr. Devlin as long as we qualified this by saying 'We don't have any knowledge of anyone being paid liars, and all we want to say is that they have been consistent misinterpretors of the information in *American Birds.*'

When Devlin telephoned again for the names, Arbib was prepared with Clement's article. But, Devlin and Arbib sharply disagreed at trial regarding the ensuing con-

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3 Clement, *The Pesticides Controversy*, 2 Env. Aff. 445 (1972).

versation. Arbib insisted that he conveyed, in essence, Clement's warning that the scientists discussed in Clement's article were not necessarily "paid liars". Devlin flatly denies that Arbib so cautioned him. He testified that Arbib made it clear that the scientists whose names were furnished to the *Times* were the persons referred to in Arbib's "Foreword" to *American Birds*. The list included the names of the appellees—Dr. J. Gordon Edwards, Professor of Entomology at San Jose State College in California, Dr. Thomas M. Jukes, Professor of Medical Physics and Lecturer in Nutrition at the University of California, Berkeley, and Dr. Robert H. White-Stevens, Professor of Biology at The Rutgers University in New Jersey—as well as Nobel Laureate Norman Borlaug and Dr. Donald Spencer, a lecturer of the National Agricultural Chemical Association. All of the accused were eminent scientists, though none were ornithologists.

Upon receiving these names from Arbib, Devlin attempted to secure comments from each of the five accused. He succeeded in reaching three: Dr. White-Stevens, Dr. Jukes, and Dr. Spencer. All of these scientists categorically denied the charges, and Dr. Spencer even referred to them as "almost libelous". Dr. White-Stevens and Dr. Jukes, in addition, sent Devlin voluminous supporting materials setting forth their side of the DDT debate. None of this material, however, responded directly to the Audubon Society's criticism of the use of Bird Count data by these scholars; it dealt almost entirely with the general merits of the pesticide controversy.

Having thus in good faith elicited both sides of the story to the best of his ability, Devlin wrote the article which is the sole ground for the libel judgment against the *Times* and the principal basis for the judgment against Clement. Devlin's story was published in the *Times* on August 14, 1972.

Pesticide Spokesmen Accused Of 'Lying' on Higher Bird Count

By John Devlin

"Segments of the pesticide industry and certain 'scientist-spokesmen,'" are accused in the current issue of American Birds of "lying" by saying that bird life in America is thriving despite the use of DDT.

The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib Jr., editor.

He wrote that the reason the Christmas Bird Count showed more birds, as cited by the pesticide industry spokesmen, was not that there were more birds these days but simply "more birders" who go out on the annual counts and thus increase the size of the totals reported.

Accused Men Named

The persons under attack were not identified in the publication.

However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and

Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

Not all of the men could be reached for comment but those who could ridiculed the accusations as "emotional," "hysterical," and unfounded, and Dr. Spencer said they were "almost libelous."

"We are well aware," Mr. Arbib wrote, "that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydro-carbon pesticides.

'Serious Declines' Found

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fisheaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this."

He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to "reiterate what we are seeing is not more birds but more birders.

"Anytime you hear a 'scientist' say the opposite," he continued, "you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

The Clement letter. Roland Clement was astonished to read in the *Times* that the Audubon Society had called its critics "paid liars." In an internal memorandum circulated the following day, Clement wrote:

> Arbib was probably incautious in giving Devlin the names involved, something he got from me. Devlin probably asked whom do you consider liars, and Arbib was trapped into listing people I have never called liars, though they may be.

Nonetheless, Clement apparently decided that the unfortunate situation could best be turned to advantage by playing down the accusation against the appellees, Spencer, and Borlaug while reiterating and clarifying the Society's position on the merits of the Bird Count controversy. Accordingly, Clement sent the following letter to the *Times* over Arbib's signature.

> Jack Devlin's punchy piece on the Audubon Christmas Bird County summary . . . unfortunately leaves out the most important qualifications we attach to these counts.
>
> It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders . . . .
>
> Nor do we like to call people liars, but those who have most consistently misused our data—Robert H. White-Stevens . . ., Thomas H. Jukes . . ., Donald A. Spencer . . ., J. Gordon Edwards . . ., and more recently Nobel laureate Norman E. Borlaug—certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

Judge Metzner ruled this letter libelous per se, though it eschewed all the suggestions of venality that had appeared in the *American Birds* Foreword and *Times* article, and though it fully explained the basis for Clement's view that the scientists were in bad faith. The letter was never published by the *Times*.

Litigation. The appellees filed their complaints against the *Times* and the National Audubon Society in April, 1973; subsequently Arbib and Clement were added as defendants. After nearly three years of discovery, Judge Metzner denied the defendants' motion for summary judgment, on the sole ground that there was a disputed issue of fact: whether Arbib actually told Devlin that those whose names were being furnished to the *Times* were not the "paid liars" referred to in *American Birds*. Despite his finding that the appellees were "public figures",[4] Judge Metzner was of the view a jury might find actual malice on the part of one or another defendant, depending upon its resolution of this question of fact, even in the face of *New York Times* v. *Sullivan, supra*.

The district judge further simplified the issues by ruling that both the *New York Times* article of August 14, 1972, and Clement's rebuttal letter of the same day were defamatory *per se* because they impugned the professional integrity of the appellees. In addition, the jury was instructed that the *Times* could be found guilty of actual malice if Devlin had serious doubts about the truth of the statement that the appellees were paid liars, even if he did not have any doubt that he was reporting Arbib's allegations faithfully. The jury returned a verdict against

4 The district court's finding that the appellees were "public figures", at least within the context of the DDT controversy, is unchallenged on this appeal. It is accordingly conceded that the jury's verdict cannot be upheld unless it is based on clear and convincing evidence of "actual malice". *New York Times* v. *Sullivan, supra*.

both the *Times* and Clement, but exonerated Arbib. It awarded $20,000 damages to Dr. Jukes and Dr. White-Stevens, respectively, and $21,000 to Dr. Edwards.

The *Times* and Clement moved for judgment n.o.v. Judge Metzner interpreted the surprising verdict against *both* appellants as reflecting the jury's belief that, although Devlin had accurately reported the information received from Arbib, he had been "reckless" in failing to investigate further after the responses from White-Stevens, Jukes, and Spencer placed him on notice of the defamatory potential of his proposed article. The evidence, in his view, was sufficient to support this finding, and accordingly Judge Metzner denied the *Times'* motion. The basis for Clement's liability was the jury's implicit finding that Clement gave Arbib the appellants' names knowing the purpose for which they would be used. Judge Metzner regarded the evidence sufficient to support this conclusion.

II.

Implicit in the jury's verdict against Clement is the finding, which we must accept, that the *Times* accurately reported the five scientists whose names were furnished by Arbib were the "paid liars" referred to in the *American Birds* Foreword. We believe that a libel judgment against the *Times*, in the face of this finding of fact, is constitutionally impermissible.

At stake in this case is a fundamental principle. Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. *See Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971). What

is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. *Cf. Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

The contours of the press's right of neutral reportage are, of course, defined by the principle that gives life to it. Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made. *Time, Inc.* v. *Pape, supra.* It is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations. *See Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

It is clear here, that Devlin reported Audubon's charges fairly and accurately. He did not in any way espouse the Society's accusations: indeed, Devlin published the maligned scientists' outraged reactions in the same article that contained the Society's attack. The *Times* article, in short, was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps.

Accordingly, we hold that it was privileged under the First Amendment.

III.

Even absent the special protection afforded to neutral reportage, *see Time, Inc.* v. *Pape, supra*, the evidence adduced at trial was manifestly insufficient to demonstrate "actual malice" on the part of the *Times*. It is uncontested that Devlin was unaware of the baselessness of the Audubon Society's dramatic allegations. Nor was there a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were "paid liars."

It is conceded that the *Times* might have published the Audubon Society's accusations without fear of liability had Devlin but refrained from eliciting the views of the Society's victims. The appellees would punish the *Times* for its effort to confirm the story, apparently maintaining that a little prudence is a dangerous thing. They assert that once Devlin heard the scientists' denials and received materials explaining their general stand in the DDT controversy, he became charged with the duty to publish absolutely nothing until he conducted a full-scale investigation plumbing to the bottom of the matter.

We do not believe, however, that the scientists' responses to Devlin's inquiries could be found sufficient to warn Devlin of the probable falsity of the Society's charges. Surely liability under the "clear and convincing proof" standard of *New York Times* v. *Sullivan* cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error. Nor, in our view, did the availability of a mass of materials, largely irrelevant to the Bird Count controversy, and completely

irrelevant to the assertedly libelous accusations of the Audubon Society, provide any basis for a finding that Devlin knew the charges were probably false. Accordingly, even if the *Times* were required to assume direct responsibility for the accusations, it could not, consistent with *New York Times* v. *Sullivan, supra,* be found liable for defamation.[5]

IV.

We conclude also that the evidence was insufficient to support the jury's verdict against Roland Clement.

It is helpful in analyzing Mr. Clement's asserted liability to understand precisely what aspect of the Audubon Society's charges constituted a libelous assault on the character of the appellees. It is plain that the letter Clement sent to the *Times* August 14, 1972, was not defamatory.

5 The *Times* vigorously argues that Judge Metzner erred in ruling Devlin's article to be libel *per se*. The *Times* carefully notes that an allegedly libelous statement must be evaluated in the light of First Amendment mandates and with full regard to the context of the assertedly defamatory utterance. *Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3439 (January 17, 1977). Since the scientific community, whose opinion of the appellees is of special concern, would be accustomed to extravagant charges in connection with the DDT debate, the *Times* urges that it would not have regarded the Audubon Society's allegations as defamatory. At the very least, the *Times* suggests, the evidence offered to show that the heart of the DDT controversy should have been admitted and the issue of whether the statements were defamatory left to the jury.

Under the particular circumstances presented in this case, we do not find any error in the ruling of the district court. Devlin's article does not even arguably present the difficult problem of carefully parsing statements to see if they are expressions of opinion rather than fact. Contrast *Buckley* v. *Littell, supra* at 892-895. As we explain below, to call the appellees, all of whom were university professors, *paid* liars clearly involves defamation that far exceeds the bounds of the prior controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid* to lie implies corruption, and not merely a poor opinion of his scientific integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case.

The critical language of that communication was as follows:

> Nor do we like to call people liars, but those who have most consistently misused our data [including the appellees] certainly have had time to learn from our patient explanations. . . .

Absent from this passage is the critical allegation that the appellees were *paid* liars. The epithet "liar" in this context, standing by itself, merely expressed the *opinion* that anyone who persisted in misusing Audubon statistics after being forewarned could not be intellectually honest. Since the basis for this opinion was fully set forth, the communication of Clement's views cannot be libelous, however mistaken they might be. *Hotchner* v. *Castillo-Puche,* Slip Op. 2521 (2d Cir. 1977).

Unfortunately, the Audubon Society's principal charges, as reported in Devlin's article for the *Times,* went far beyond a mere accusation of scientific bad faith. The appellees were charged with being "paid to lie". It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than "paid liar." It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees.

Because of the unusual circumstances presented here, however, it is difficult to assign responsibility for the false denunciation of the appellees as paid liars. Arbib, of course, was exonerated by the jury. But, there is scarcely a wisp of evidence in the record from which it could be inferred that Arbib's associate at the Audubon Society, Clement, supplied Arbib with the appellees' names, *knowing* they would be portrayed as paid liars. Indeed, Arbib's testimony was completely uncontradicted, that Clement

provided the names of prominent spokesmen on behalf of DDT only on condition that Devlin be told "we are not calling anyone paid liars." Of course, the jury evidently found that Arbib failed to warn Devlin that he was not calling the appellees paid liars, though he did caution against naming them in a *Times* article. But this failure can hardly be attributed to Clement, who on the morrow of the *Times* article confidently expressed his belief that Arbib had been "trapped" into identifying the appellees as those referred to as paid liars in the *American Birds* Foreword.

In the absence of any direct evidence that Clement gave Arbib the names of prominent DDT defenders, knowing they would be pilloried as paid liars in the *New York Times,* the appellees vigorously urge that Clement's letter of August 14 in effect ratified the charges. But, although by this missive Clement demonstrated himself quite content to have called the appellees liars, he never intimated that the appellees were corrupt. Since this accusation of venality alone was defamatory, Clement's letter to the editor—never published—simply does not tend to establish its author's responsibility for the libelous statement appearing in Devlin's article.[6]

V.

We do not underestimate the pain and distress which the publication of the Audubon Society's thoughtless

6 At trial the appellees called Victor Yannacone, Jr., who testified that Clement was present, some years earlier, at meetings of the Environmental Defense Fund where "smearing" proponents of DDT in the press was discussed. This testimony was contradicted by Dr. Charles Wurzer, another alleged participant in these meetings, and there was no evidence that any "smearings" actually occurred. We believe the vague and dated testimony of Yannacone does not, in any way, support the inference that Clement ever accused the appellees falsely of corruption.

charges has caused the appellees. And we are fully aware that, in Professor Emerson's words,[7]

> A member of a civilized society should have some measure of protection against unwarranted attack upon his honor, his dignity and his standing in the community.

Our holding today does not in any way condone the mischievous and unwarranted assault on the good name of the appellees, who appear from their writings to have entered the lists in favor of DDT in good faith and from humanitarian motives that ought to be beyond reproach.

Nevertheless, we believe that the interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend. It is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessings of a democratic way of life.

We believe that the *New York Times* cannot, consistently with the First Amendment, be afflicted with a libel judgment for the accurate reporting of newsworthy accusations made by a responsible and well-noted organization like the National Audubon Society. And, we are convinced that Roland Clement cannot be found liable for a defamatory statement which, as far as this record reveals, he never made. Accordingly, we reverse the judgments against the *Times* and Clement and dismiss the appellees' complaint.

7 T. Emerson, *Toward a General Theory of the First Amendment* 69 (Vintage 1967).

APPENDIX B

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1727 (CMM)

No. 45425

J. GORDON EDWARDS, Ph.D.
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR., ROLAND C. CLEMENT,
ELVIN J. STAHR, JR.,

Defendants.

METZNER, D.J.:

Defendant Roland C. Clement moves for judgment notwithstanding the verdict rendered by the jury in favor of the plaintiffs in this action. Fed. R. Civ. P. 50(b).

This is a libel action in which the jury awarded compensatory damages, but denied punitive damages, in favor of each of the plaintiffs against the New York Times and defendant Clement, a vice president of the National Audubon Society, Inc. (the Society). The jury also rendered a verdict in favor of defendants Robert S. Arbib, Jr. and the Society.

The standard of liability set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), permits recovery only if the

plaintiff proves "that the statement was made with 'actual malice,—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." A great deal of the background of this lawsuit has been set forth in the companion motion brought by the New York Times Company and need not be repeated here.

On this motion the court must view the evidence in the light most favorable to the plaintiffs. *O'Connor v. Pennsylvania R.R.*, 308 F.2d 911, 914 (2d Cir. 1962).

Arbib was asked by Devlin for the names of the scientists to whom he was referring as paid liars in the foreword to the April 1972 issue of American Birds. American Birds is a magazine published by the Society. Arbib told Clement about Devlin's request and Clement was the person who furnished the names. Clement is an officer of the Society with the title of Vice President for Biology, "which means that I had overview of the scientific validity of Audubon Society positions."

Clement knew the purpose for which those names would be used in the Times story. He deliberately called those plaintiffs liars. Clement read the story in this Times on the morning of publication and sent a letter over Arbib's name to the New York Times. This letter referred to "Jack Devlin's punchy piece," and went on to say, "[n]or do we like to call people liars, but" those who have misused the bird count data have had the opportunity to learn of their misinterpretations from the Society's explanations. Clement testified that the import of this letter was to rebut the statement that the five named persons were being called liars. He testified that the language in the letter meant that "we are not calling people liars." Despite Clement's testimony, the jury was entitled to draw the inference from the letter that Clement did intend to call the five liars.

No amount of honest controversy regarding the use of the bird count in the D.D.T. controversy can justify this action. There just was no basis for calling the plaintiffs paid liars.

Finally, the jury observed Clement on the witness stand. His demeanor and attitude added to the background of the facts which the jury was justified in finding from the evidence. For example, he flatly denied that anyone was being called a liar in the Foreword. The evidence amply supports the verdict of the jury of actual malice as defined in the *Sullivan* case *supra*.

Motion denied.

So ordered.

Dated: New York, N.Y.
December 9, 1976

CHARLES M. METZNER
U.S.D.J.

APPENDIX C

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1727 (CMM)

No. 45411

J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,
Plaintiffs,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR., ROLAND C. CLEMENTS,
ELVIN J. STAHR, JR.,
Defendants.

APPEARANCES

Rothwell, Cappello & Berndtson
Attorneys for Plaintiffs
1225 19th Street, N.W.
Washington, D.C. 20036
Thomas A. Rothwell
Arthur H. Berndtson

Of Counsel

Cahill Gordon & Reindel
Attorneys for Defendant
The New York Times Company, Inc.
80 Pine Street
New York, N.Y. 10005
Floyd Abrams
Eugene R. Scheiman
Ruth D. MacNaughton

Of Counsel

METZNER, D.J.:

Defendant The New York Times Company (the Times) moves for judgment notwithstanding the verdict rendered by the jury in favor of the plaintiffs in this action. Fed. R. Civ. P. Rule 50(b).

This is a libel action in which the jury awarded compensatory damages, but denied punitive damages, in favor of each of the plaintiffs against the Times and defendant Roland Clement, a vice president of the National Audubon Society, Inc. (the Society). The jury also rendered a verdict in favor of defendants Robert S. Arbib, Jr. and the Society.

The basis for the motion is that the standard of liability created in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), has not been met by the evidence produced by these plaintiffs. That standard permits recovery only if the plaintiff proves "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The background of this lawsuit starts with the appearance of the Foreword to the April 1972 issue of "American Birds," a magazine published by the Society. Despite its date, the magazine was not distributed until the first week of July, 1972. Sometime around the end of July or the beginning of August, John Devlin, Sr., a reporter for the Times who has specialized in nature stories, read the issue and his attention was caught by statements made in the Foreword directed to the use of the Christmas bird count in connection with the DDT controversy that was raging in those days. The Foreword stated that it was "well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals... as proving that the bird life in North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides." The Foreword went on to

state that: "This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons."

After stating what is supposed to be the truth regarding the bird count and its implications, this portion of the Foreword concludes:

> "Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

On August 14, 1972, a two-column story appeared in the Times under a Devlin byline. The headline over the story read, "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." According to the article, the accuser was Arbib, the editor of "American Birds." The story goes on to state that while the Foreword did not identify the alleged spokesmen accused of lying, Arbib furnished the reporter with the names of five persons intended to be covered by the accusation, three of whom are plaintiffs in this case. The Times story gave the five names with identifying information as to each. The three plaintiffs in this lawsuit are Dr. Robert H. White-Stevens, a professor of biology and chairman of the Bureau of Conservation at Rutgers University, Dr. Thomas H. Jukes, a professor of biochemistry at the University of California at Berkeley, and Dr. J. Gordon Edwards, a professor of entomology at San Jose State College. The other two persons named in the story were Dr. Norman E. Borlaug, a Nobel Prize winner, and Dr. Donald A. Spencer, a retired ecologist and now a private consultant.

The Times story relates that not all those named could be reached for comment, but that those who were reached ridiculed the accusations as "emotional" and "hysterical," with Dr. Spencer being quoted as saying they were "almost libelous." The story concludes with quotations from the Foreword, including those referred to above, as well as paraphrasing of other protions.

The case was submitted to the jury without objection on the assumption that the plaintiffs were public figures. The story is clearly libelous. *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976).

There is no doubt that the Times story accurately reported and correctly quoted from the Foreword in American Birds, although the headline was slightly off in accuracy. The jury found on credible evidence that the Times accurately reported the five names furnished by Arbib as being those referred to as liars in the Foreword.

The Times' position is that under these facts, the jury was not presented with clear and convincing proof that the article was published with actual malice and therefore could not have returned a verdict in favor of the plaintiffs. If this were all there is to the case, the court might be of a mind to grant defendant's motion. In fact, it might well have disposed of the litigation by granting the usual motion made at the end of the plaintiffs' case or at the end of the entire case. However, the events that transpired between the time Devlin read the Foreword and the publication of his story on August 14, 1972, require a denial of the motion.

In considering a motion for judgment notwithstanding the verdict, the court shall view the evidence in the light most favorable to the plaintiffs. *O'Connor v. Pennsylvania R.R.*, 308 F.2d 911, 914 (2d Cir. 1962).

We have here a reporter of 25 years' experience who must have known from the outset that he was dealing with a libelous article. The Times has never contended that the story was not libelous. The reporter attended annual meetings of the Society, went on field trips, and had written several articles for the Society. He was not a novice as to the background of the story. Finally, his memory on the witness stand as to the events leading up to the publication of the story was abysmally poor and contadictory. He could not remember with any degree of accuracy to whom he spoke or the extent of the conversations.

The jury was fully justified in finding that while Arbib had furnished Devlin with the names, he had also cautioned against their use. This does not necessarily include a finding that Arbib had stated to Devlin that he was not calling the five persons liars.

Devlin pressured Arbib for the names because he was of the opinion that this was newsworthy—the public ought to know which scientists were being called liars by the Society.

Devlin, with the names in hand, contacted Dr. White-Stevens on August 4 and read the Foreword to him. They had a 45-minute telephone conversation which covered the whole range of the agricultural chemical business. The testimony shows that this plaintiff was an outstanding scholar in the field of biology. Devlin was told that the statements were slanderous and scurrilous and should be checked carefully before being used. Dr. White-Stevens furnished Devlin with the telephone numbers of the other four named by Arbib although Devlin already knew that Dr. Borlaug was a Nobel Prize winner and associated with Rockefeller University, a most prestigious research institution here in New York City. This plaintiff also furnished Devlin with the telephone numbers of other eminent scientists in the field of pest control who should be contacted for their views on the subject. Devlin offered Dr. White-Stevens the opportunity to publish a story on the Op-Ed page of the Times, or even write an article for the Sunday Magazine section, but this offer was never followed up by Devlin.

Finally, Dr. White-Stevens recapitulated this conversation in a letter to Devlin on August 8 in which he furnished a list of materials for Devlin to read.

Devlin next called Dr. Jukes on August 7. The testimony of Dr. Jukes showed that he is an eminent scientist in the area of biochemistry and regarded as an international authority on poultry nutrition. He organized the first chapter of the Sierra Club outside the state of California. Devlin told Dr. Jukes that he was working on an article predicated on information given to him by the Society to the effect that Dr. Jukes was a paid liar on behalf of the chemical industry. Dr. Jukes explained to Devlin his method of evaluating bird counts and referred to a letter written by the president of the Hawk Mountain Association. This plaintiff also told Devlin he was not a liar. The telephone conversation was followed up by Dr. Jukes in a letter sent to Devlin the same day.

Devlin also spoke on the telephone to Dr. Spencer who was not a party to this action, nor did he testify as a witness. However, Devlin's notes show that he wrote "WOW" next to the notation that Spencer called the statements in the Foreword libelous. Devlin testified on trial, "These are newsmaking names. The charges are very dramatic and newsy."

We thus have an initial publication which was not actionable in the absence of names. The reporter pushes for disclosure of the names so that he might write a story, in a newspaper with over 900,000 daily circulation, about individuals who have been called liars in one of the Society's publications. He knows from the inception that one of the scientists being called a liar is a Nobel Prize winner. He finds out as early as ten days before publication that at least two of the plaintiffs are not in the employ of the pesticide industry, nor are they being paid by such manufacturers to lie. He is given extensive background material on the views of these persons. He is furnished with names of other scientists with whom he might check out the story. He never made any effort to consult with counsel for the Times as to possible liability if the story were published. There is no evidence that any of his superiors made such inquiry.

Ten days were devoted to putting this story in shape with three different drafts of summaries sent by Devlin to his superiors for approval. Despite the warnings and the information furnished the reporter, the story appears in the newspaper as though it had been written the day after the Foreword first appeared in print and no investigation had ever been made. Dr. White-Stevens testified that after a week, he stopped reading the Times for any story as to the Foreword. He assumed that Devlin had checked out what he had told Devlin and that Devlin was satisfied that the story was not warranted. Great was this plaintiff's surprise when a student brought the story to his attention. He read it and found that Devlin had ignored everything he told him in the lengthy telephone conversation and in his letter to Devlin.

It cannot be said that the Times knew that the statements in the story were false. However, the jury was justified in finding

clear and convincing proof from the evidence and the inferences to be drawn therefrom that the story of August 14 was published with reckless disregard of whether it was false or not. This satisfies the test of malice as defined in the *Sullivan* case, *supra.*

This evidence also satisfied the test in *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968), to the effect that:

> "[R]eckless conduct is not measured by whether a reasonable prudent man would have published, or would have investigated before publishing. There must be sufficient evidence t permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

I am aware of the words in the sentence following the above quotation, which states that such a test "permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." I cannot take these words to mean that the reporter's testimony is not subject to impeachment by the accepted use of cross-examination and contradictory direct testimony.

Motion denied.

So ordered.

Dated: New York, N.Y.
December 1, 1976

/s/ CHARLES M. METZNER
U.S.D.J.

APPENDIX D

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ.1727 (CMM)

No. 43779

J. GORDON EDWARDS, Ph.D., et al.,

Plaintiffs,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC., et al.,

Defendants.

METZNER, D.J.:

Defendants move for summary judgment in this defamation action based upon an article in "American Birds," a subsequent report on that article in the New York Times on August 14, 1972, and a letter from one defendant to the New York Times dated August 14, 1972.

The April,1972 issue of "American Birds," a quarterly publication of the National Audubon Society, reported the results of the annual Audubon Christmas Bird Count. In the foreword of that issue its editor, defendant Robert Arbib, wrote that "certain paid 'scientist-spokesmen'" of the pesticide industry were citing the Christmas Bird Count totals to prove that North American bird life was thriving despite the use of DDT. He called this conclusion "false and misleading," stating that the higher counts were results of more and better bird counters and not more birds. Arbib further stated that "[a]ny time you hear a

'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." The April, 1972 issue of "American Birds" was not mailed out until July.

On August 14, 1972, the New York Times carried an article about the foreword to "American Birds" bearing the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count.'" The New York Times named five scientists who had been cited by Arbib in an interview with John Devlin, the New York Times reporter. Three of these scientists are the plaintiffs in this action.

On August 24, 1972, defendant Roland Clement sent a letter over the signature of defendant Arbib to the New York Times. This letter referred to "Jack Devlin's punch piece." Clement wrote "[n]or do we like to call people liars, but" those who have misused the Audubon data have had the opportunity to learn of their misinterpretation from the Society's explanations. The five scientists were named in this letter. The New York Times did not print the letter.

Defendants contend that plaintiffs are public figures in the context of this action because of their reputations in the scientific community and their public stands on the controversy surrounding the use of DDT. As public figures under the standard laid down in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and in *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), plaintiffs must prove actual malice on the part of defendants in order to succeed in this action.

Plaintiffs deny that they are public figures, contending that the controversy surrounds the use of the Audubon Christmas Bird Count data, not a matter of general public interest.

The controversy surrounding the use of DDT is of interest to the public. Plainitffs are prominent scientists who have written and lectured on various subjects, including the use of pesticides.

They are public figures in the context of this action. *Guitzx v. Westinghouse Electric Corporation,* 396 F. Supp. 1042 (S.D.N.Y. 1975) *Adey v. United Action for Animals, Inc.* 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd nom.*, 493 F.2d 1977 (2d Cir.), *cert. denied,* 419 U.S. 042 (1974).

The burden is on the movants to show the absence of any genuine issue as to whether they acted with actual malice when they made the statements. A statement is made with actual malice if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan, supra* at 280

The Court has reviewed the depositions of the parties and of perspective witnesses which plaintiffs have submitted in opposition to this motion. Defendant Arbib testified that he wrote the article in "American Birds" with no specific individuals in mind, upon a suggestion by defendant Clement or another that the magazine say something about misuse of the Christmas Bird Count data. He testified that John Devlin pressured him for the names of the scientists to whom he was referring for use in the New York Times report on the article. Upon consultation with Clement, Arbib gave Devlin the names of five scientists cited by Clement. Both Arbib and Clement testified that they supplied the names of the scientists as misusers of data and not as liars. Arbib said that he told Devlin that he did not want the men to be called liars.

Devlin testified that Arbib said that it would be better not to use names, but that the five scientists he did name were the persons to whom the article referred. Devlin denied that Arbib said that these men were not to be called liars. In addition, there is the August 14, 1972 letter to the New York Times written by Clement, over the signature of Arbib, from which a jury might infer approval of the New York Times article.

Devlin testified that he called some of the scientists before publication. Their testimony is that they protested the charge as

untrue and sent letters and information about the DDT controversy to Devlin. One labeled the charge as libelous. Whether there was adequate investigation of a story that was not "hot news" is a question of fact for a jury. A finding that the investigation was inadequate would permit an inference of actual malice. *Curtis Publishing Company v. Butts, supra* at 156-158.

There are also allegations of the animosity of Clement and the National Audubon Society to those who oppose their position on the DDT controversy. Those are supported by the deposition testimony of Victor Yarnacona, an attorney who has worked with Clement and the National Audubon Society on environmental matters. He testified about discussions at the Environmental Defense Fund, with Clement and other associates of the National Audubon Society participating. These discussions centered around methods to silence or discredit opponents of their stand on DDT. He said that one plaintiff was "a constant subject of discussion" and another was "an occasional subject of discussion." This testimony would go to the question of the intent of defendants.

In sum there are questions of fact raised here about the state of mind and good faith of the defendants in publishing a charge that plaintiffs were lying. Viewing the evidence submitted and the inferences which might be drawn from it "in the light most favorable to the party opposing the motion," *United States v. Diehold, Inc.*, 369 U.S. 654, 655 (1962), questions of fact exist as to whether any or all defendants acted with actual malice.

The motion is denied.

So ordered.

Dated: New York, N.Y.
January 23, 1976

CHARLES M. METZNER
U.S.D.J.